In The Supreme Court of Bermuda

CIVIL JURISDICTION
2019 No: 401

BETWEEN:

DENNIS ROBINSON

Plaintiff

And

THE PAROLE BOARD

THE COMMISSIONER OF THE DEPARTMENT OF CORRECTIONS

Defendants

JUDGMENT

Final Hearing of Application for Judicial Review against Decision to Recall Prisoner from Release on Parole and keep in Detention- Differing applications of Sections 12 and 13 of the Prisons Act 1979 –Release on Licence in respect of a Sentence of Life Imprisonment

Common Law Rules and Principles of Natural Justice against Procedural Impropriety – Caution against Procedural Merges between Judicial Review Applications and Pleadings of Breaches of Fundamental Constitutional Rights

Refusal of Writ of Habeas Corpus

Dates of Hearing:	Wednesday 16 October 2019
Date of Judgment:	Tuesday 19 November 2019
Counsel for the Plaintiff:	Mr. Mark Pettingill (Chancery Legal Ltd)
Counsel for the Defendants:	Mrs. Shakira Dill-Francois (Deputy Solicitor General)

JUDGMENT of Shade Subair Williams J

Introduction:

1. The Plaintiff is currently serving a life sentence of imprisonment under section 288(1) of the Criminal Code Act 1907, having been convicted for the offence of murder on 3 February 2006. The life sentence comprises of a statutory eligibility to parole for release on licence by the Parole Board, as established by the Parole Board Act 2001.

2. On 18 April 2016 the Plaintiff was granted parole by the Parole Board (intermittently referred to as "the Board") on various conditions, the relevant portion being as follows:

   (iv) Not to commit another offence against the Laws of Bermuda during the period of this Parole Order and to immediately inform the Parole Officer of any arrest or charge.
   …
   (viii) To refrain from activities and association with persons, places or things that may lead to illegal activities. This prohibition incudes but is not limited to maintaining an affiliation with any gangs or being in the company of gang members; being in possession of any weapons. Any written directive from the Parole Officer in terms of refraining from specific activities or associations must be adhered to.
   …

3. On 15 November 2016, the Plaintiff and a second person were arrested on suspicion of being in possession of a controlled drug. The following day, the Plaintiff was recalled by the Board into prison custody. A Revocation Order purporting to be made under section 12(5) of the Prisons Act 1979, dated 21 November 2016, ("the Revocation Order") was exhibited to the affidavit evidence of an administrative assistant to the Board. The Revocation Order states that the Board was satisfied that the Plaintiff failed to comply with the two above-stated conditions at (iv) and (viii).

4. On 6 January 2017, the Plaintiff was charged with possession of cannabis with intent to supply, contrary to section 6(3) of the Misuse of Drugs Act 1972. On 2 February 2017 he first appeared before the Magistrates' Court to be formally charged on Information 17CR00039.

5. What chronologically followed thereafter is amply outlined in the 13 September 2019 judgment of the learned Assistant Justice Mr. Delroy Duncan where a constitutional challenge was successfully made by the Plaintiff on the ground that his rights to a fair hearing in a reasonable timeframe under section 6(1) of the Bermuda Constitution had been infringed. The Magistrates' Court proceedings against the Plaintiff were accordingly stayed.

6. Duncan AJ, however, did not stay the criminal proceedings against the Plaintiff's co-accused. At paragraph 67 of the judgment, Duncan AJ held:

   "*In the case of the Second Plaintiff, she has not been in custody awaiting the outcome of her fate. Although the anxiety she has suffered pending the outcome of her charges is a relevant factor of prejudice, such prejudice as she has experienced, can be mitigated in the remedy the trial court can impose at the conclusion of the criminal proceedings. For example, by way of reduction of sentence. For this reason, despite my decision that the Second Plaintiff's Constitutional right to a fair trial has been breached, I do not order that her retrial be stayed or discontinued*."

7. The Plaintiff's continued detention under the Revocation Order is the subject of complaint before me.

8. Taking flight from the Court's decision to stay the Magistrates' Court proceedings against the Plaintiff, the Plaintiff's Counsel appeared before this Court on an ambitious application filed on 9 October 2019 for a writ of habeas corpus *ad subjiciendum* pursuant to Order 54 of the Rules of the Supreme Court 1985 (RSC). The application was supported by affidavit evidence sworn by the Plaintiff.

9. The application sought for this Court to determine, *ex parte*, whether the Second Defendant was unlawfully detaining the Plaintiff. The Plaintiff's application was bound for defeat as the grounds advanced wholly depended on the dicta of Duncan AJ in his 13 September judgment. I summarily dismissed the application for an *ex parte* order of release as the question of the lawfulness or unlawfulness of the Plaintiff's continued detention was arguable. However, I directed that such a question was a matter which ought only to be determined by way of an *inter partes* application for judicial review in an expedited timeframe.

10. On 15 October 2019, Mr. Pettingill filed a Form 86A under RSC Order 53/3 for leave to apply for judicial review on two grounds:

    1. *The Respondents' Decision to unlawfully recall the Applicant between 15th November 2016 an present day;* (and)

    2. *The Respondents' Decision to unlawfully detain the Applicant between 13th September 2019 and present day.*

11. Counsel for both sides subsequently appeared before me on 16 October 2019 and sensibly agreed that the Form 86A would be treated and argued as if it were a final *inter partes* hearing of an Originating Motion on the basis that leave for judicial review had been granted by me (at least implicitly) at the 9 October hearing.

12. The relief prayed under the Form 86A was as follows:

    1. *An Order of mandamus to the Respondents directing/ordering them to release the Applicant from custody with immediate effect;*

    2. *An Order for a declaration ruling that the Respondents acted in breach of natural justice and in contravention of the Bermuda Constitution 1968 Section 5 (protection from arbitrary arrest or detention);*

    3. *An Order for a declaration ruling that the Respondents acted unlawfully when they failed to offer the Applicant a hearing or provide any reasons for their decision to recall him on 15th November 2016;*

    4. *An Order for a declaration ruling that the Respondents acted with procedural unfairness when they failed to offer him a hearing or provide any reasons for the decision to recall the Applicant on 15th November 2016;*

    5. *An Order for a declaration ruling that the Respondents acted with procedural unfairness when they failed to offer him an oral hearing or provide any reasons for their refusal to release the Applicant from custody on or after 13th September 2019;*

    6. *An Order for damages;*

    7. *An Order for costs on an indemnity basis;*

    8. *Any further or other relief.*

13. At the hearing before me, I permitted Mr. Pettingill to expand the prayer for relief to include an order of certiorari to quash the Board's decisions to recall the Applicant on 15 November 2016 and to detain the Applicant between 13th September 2019 and present day.

14. Full submissions were made by both sides and I reserved judgment which I now provide with the reasons herein.

The Plaintiff's Evidence

15. I have considered the unsworn[1] affidavit evidence of the Plaintiff ("the Plaintiff's affidavit") and refer in particular to paragraphs 3 and 4:

> *3. Approximately one week later* (following the 15 November 2016 arrest), *I was taken without any notice from Westgate to a meeting with the Parole Board. I was told at that meeting that I would be recalled. I asked for reasons and at first I was not provided with any reasons. I was later told that it was because I had been charged with a criminal offence, which was not accurate- I was not charged until 6th January 2017. I was also told the decision was based on a letter received from the Ministry. I asked to see the letter or to be provided with a copy of that letter, but those requests have been ignored and denied. I have still never seen a copy of that letter.*
>
> *4. At that meeting:*
>
> *(i) I was not given an opportunity to speak to anything related to my recall either in writing or verbally and I was never given any formal reason for me being recalled as it related to any breach of condition;*
> *(ii) I was not invited to have an attorney or "friend" present to protect my legal interests or witness proceedings;*
> *(iii) I was not shown any documents that the Board might have relied on, including the aforementioned letter;*
> *(iv) The provisions of the Criminal Code Amendment (No 2) Act 2014 were never raised or pointed out to me.*

16. At paragraph 7 of the Plaintiff's affidavit it is stated that Mr. Pettingill wrote to the Board to request sight of the letter. On the third page of the unnumbered exhibit documents, there is a 15 November 2017 letter from Chancery Legal to the Board. In that letter Mr. Pettingill advised that the Plaintiff unequivocally denied the charge and pointed out that his co-accused had acknowledged responsibility for the offence in Court and that the matter was fixed for trial in January (2018).

17. In the final part of the two-paragraph letter, Mr. Pettingill stated:
"*We take the view that this is unfair on our client who has been granted bail by the Court throughout the process but has been effectively imprisoned for a year as a result of the charge. We would invite you with respect in allowing him to be released on license and*

[1] Mr. Pettingill informed the Court that the Plaintiff was unable to secure the assistance of a Commissioner of Oath before whom he could swear his affidavit from prison custody in the needed timeframe. No issue of contention arose between the parties as to the fact that the affidavit filed was unsworn.

remain on bail until the current matter before the Court is completed. It would be a complete travesty of justice, in our view, (if) he is ultimately acquitted and has had to spend any further time incarcerated."

18. By reply letter dated 22 December 2017, the Parole Board requested for Mr. Pettingill to provide various Court documents under the Magistrates' Court proceedings in addition to information about the Plaintiff's proposed employment and housing accommodation.

19. Nearly a year later, Mr. Pettingill further wrote to the Board on 10 October 2018 and 13 December 2018. In the former letter Mr. Pettingill advised the Board that at the conclusion of the trial which came to pass some two years after the Plaintiff first appeared in the Magistrates' Court, the learned Magistrate took the extraordinary step of recusing himself of his own motion. Mr. Pettingill offered to appear before the Board in furtherance of the Plaintiff's request to be released on licence. In the December letter, Mr Pettingill advised that his Client had applied for parole 'in the normal way' as per the instructions of the Board. He complained that he had not yet received a response from the Board and urged to be given a date for the review of Mr. Robinson's application for release.

20. The Court was also shown a letter to Junior Crown Counsel, Ms. Tanaya Tucker, from the Chairman of the Board, Mr. Rolfe Commissiong, dated 22 July 2019. This correspondence was placed before Duncan AJ in answer to queries made by the Court leading up to the 13 September 2019 judgment. The letter provides as follows:

Regarding the above-captioned matter and the Chancery Legal letter dated 15 November 2017, we as the Parole Board have been tasked with responding to four (4) questions from the Supreme Court of Bermuda pertaining to Mr. Dennis Alma Robinson's current situation regarding parole.

Our answers are as follows:

Question 1: Has the Parole Board complied with the provisions contained in the Criminal Code Amendment (NO.2) Act?

Answer: Yes, The Parole Board has complied with all of the provisions contained in the Criminal Code Amendment (No. 2) Act 2014. By way of background, Mr. Robinson was recalled by the Police (as per section 2 of the Criminal Code Amendment (No. 2) Act 2014 and NOT The Parole Board.
Nevertheless, Mr. Robinson breached condition eight (8) of the General Condition section of his Parole License, which reads as follows:

(viii) To refrain from activities and association with persons, places or things that may lead to illegal activities…

Through his actions and/or associations, Mr. Robinson has placed himself in violation of condition 8 as he was arrested with a person who has admitted to and who has been charged with being in possession of a controlled drug, namely cannabis.

Question 2: In light of the enactment of the Criminal Code Amendment (NO.2) Act 2014, are the above Bermuda legal authorities of Smith and Trott still good law concerning how the Parole Board should address a breach of licence?

Answer: Smith & Trott appears to be still good law concerning how the Parole Board should address a breach of license.
This is borne out in the Learned Chief Justice's comments as stated in Smith:

"When the reason for recall is pending criminal charges in respect of some offence alleged to be committed while on licence, I do not think the Minister need wait until the Court has disposed of those charges. To do so might well defeat the whole process if the trial is delayed, as it often may be. Release on licence is only a privilege and not a right, and the sanction of recall, to be effective, has to be a summary one. I think therefore that the Minister can decide to recall on the basis of pending criminal charge before they are determined by a Court, although whether he does so remains a matter for the exercise of an informed discretion taking account of all the circumstances.

However, before recommending such a course I think that the Board should have before it sufficient details of the case for its members to understand the circumstances of the offence generally to see whether there is a prima facie case, and the prisoner should be afforded sight of that material so that he can properly address the Board on that point…"

Applying the Smith & Trott principles to the instant case, Mr. Robinson was afforded a meeting with the Parole Board and was told to be considered for release pending trial he would have to meet the basic requirements which are fulltime employment and place to reside.

Subsequent to that meeting Mr. Robinson has provided neither to the Parole Board. It should also be noted that his employer, the owner of Mind Body & Spirit Wellness is also his co-accused.

As he was allowed the opportunity to meet with the Board and provided with a direction from the Board for his release, and subsequently not complying with that direction, the Board is baffled as to why Mr. Robinson's lawyer has placed the delay at the Board's feet. Even

though, as per the decision in Smith and Trott, it is within our purview to recall Mr. Robinson pending the outcome of his criminal case.

Question 3: Can either party please confirm the Parole Board is on notice of these proceedings?

Answer: We, the parole Board can confirm that we are now on notice regarding the above-caption proceedings.

Question 4: Provide written confirmation from the Parole Board that it has received the Chancery Legal letter and its written response to the letter or response by affidavit?

Answer: The Parole Board has received the Chancery legal letter and the information provided above is our written response to the letter.

Sincerely,

Rolfe *Commissiong, JP*

Chairman of the Parole Board

21. By letter dated 13 September 2019, Mr. Pettingill wrote to the Parole Board through its administrative assistant, stating the following:

"*We refer to the above and to our recent telephone call with The Board's Counsel, Vaughan Caines, and enclose a copy of the judgment which was handed down this morning in the Supreme Court by the Honorable Acting Justice Duncan. In short, the criminal case against Dennis Robinson has been stayed (discontinued) due to the unreasonable delay and reason for time spent in custody which infringed on his Constitutional rights.*

In particular we refer you to paragraphs 45-47 f the Judgment which addresses whether the Parole Board fulfilled their legal obligations in recalling Mr. Robinson. At paragraph 53, the Judge finds that the recall is "directly attributable to the charges he faces". As he no longer faces these charges it follows that he should now be released particularly in light of the time he has spent incarcerated.

In light of the above, we trust that Mr. Robinson's recall will now be lifted on an expedited basis allowing for his immediate release from custody."

The Respondent's Evidence

22. The Respondent filed affidavit evidence from the Administrative Assistant to the Board, Ms. Juliana Swan, and also from Mr. Elliott Pitcher Jr who described himself as the Case Manager for the Plaintiff since 3 August 2015 in addition to being the Assessment Officer at the Department of Corrections.

23. Ms. Swan deposed that on 16 November 2016, Dr. Zina Woolridge of Court Services made the Chairman of the Parole Board aware that the Plaintiff had been arrested. She further relayed that it was the Department of Court Services who had requested that the Bermuda Police Service ("BPS") transport the Plaintiff to Westgate Correctional Facility pursuant to section 70S(1)(b) of the Criminal Code until he could be seen by the Parole Board.

24. In Ms. Swan's affidavit, she says that the Board met with the Plaintiff on 21st November 2016 at the Prison Farm on an expedited basis. At paragraphs 9-12 of her affidavit, she describes the Board proceedings flowing from the 21st November 2016 hearing:

"*9. A hearing was held in which the Applicant was informed about the allegations made against him. The allegations were shared with him and read aloud in his presence. This is the normal procedure when a Parolee appears before the Board. The Applicant was advised that on the 15th November 2016, he was arrested for suspicion of a controlled drug with intent to supply. This arrest was based on the fact that when approached by police officers the Applicant attempted to run away and discarded a backpack which was later retrieved and contained plant-like material. (see pages 7 & 11 of Exhibit JS-1).*

10. The Applicant was given the opportunity to be heard in relation to the allegations made against him and was allowed to put forth his side of the story. He advised that he was surprised that he was breached as he had done nothing wrong. At the conclusion of the hearing, the Board agreed that the Applicant should be recalled and a Revocation Order was made; this is recorded in the Minutes of the 21st November 2016. (see page 7 of Exhibit JS-1)[2]

11. On the 3rd July 2017, the Applicant was seen by the Board for his second interview and a decision was made that his case would be reviewed after the conclusion of his court case which was due to be held on the 4th July 2017 (see page 11 of Exhibit JS-1).

[2] The Board's record of the Minutes of the meeting held on 21 November 2016 is located at page 8 of the exhibit bundle.

12. *On the 15 November 2017, the Board received correspondence from attorney Mark Pettingill of Chancery Legal requesting that the Applicant be released on licence. (see page 12 of Exhibit JS-1).*"

25. The Minutes of the Board's 21 November 2016 meeting is produced in the form of an "*Extract of Minutes of November 21, 2016*". In a single paragraph description of the interview, it states:

THE INTERVIEW

Mr. DeVent led the interview. Mr. DeVent asked Mr. Robinson to explain why he is before the Parole Board.. Mr. Robinson said a statement has been made and given by another party which will exonerate him from everything. He said his lawyer was Mark Pettingil (sic) and he was surprised that he was being breached as he has done nothing wrong and that he has not been charged with anything. Dr. Rayner informed Mr. Robinson that the Board was going on documents received fr (sic) Court Service. Mr. DeVent informed Mr. Robinson that he has had a connection with the police. Mr. Devent reminded Mr. Robinson of his charges of drug offences and murder and that the Parole Board is required to adhere to the Conditions of his Parole Licence. Mr. DeVent informed Mr. Robinson that he was being Recalled.

The Board agreed that Mr. Robinson be Recalled.

26. In explaining the Plaintiff's continued detention since the 13 September 2019 judgment from Duncan AJ, Ms. Swan stated at paragraphs 18-19:

"*18. However, it should be noted that even though the judgment was received, the Parole Board would still have to receive the Parole package completed by the Applicant. This is how an inmate gets before the Parole Board and Corrections would not submit the package to the Board until it is complete, thus the inmate would not be brought before the Board.*

19. It is incorrect to say that the Board is responsible for the fact that the Applicant has not appeared before the Board. When the packages are received, I set them for hearing and would have set this matter down on an urgent basis once the correct procedure had been followed."

27. The assertion that the Plaintiff failed to properly submit a completed application for the Board's review is further elucidated in Mr. Pitcher's affidavit at paragraphs 4-15:

4. When an inmate makes a request to be considered for Parole, he is required to complete a Parole package which requires the following to be submitted:

i. a 4page parole application form
ii. a housing form confirming who the inmate will be residing with;
iii. an employment form confirming who the inmate will be employed with and in what capacity.

5. *Once the package is complete and the documentation received by me, the package is submitted to the Principal Officer responsible for Administration. Simultaneously, I forward a copy of the housing form and employment form to the Department of Court Services.*

6. *Thereafter, the Principal Officer forwards the entire dossier, which includes the package completed by the inmate as well as assessment reports, to the Parole Board; until the package is completed it will not be forwarded to the Parole Board. However, I would often follow up with inmates to monitor their progress and to see if they require any assistance with completing the package.*

7. *In relation to the Applicant I followed up with him may (sic) times to enquire about the status of his Parole Application.*

8. *On the 15th October 2018, the Applicant advised me that a letter was sent to the Parole Board by his lawyer dated the 10th October 2018. He advised me that he was drafting a handwritten letter dated to be forwarded to the Parole Board.*

9. *On the 18th October 2018, I spoke with the Applicant to get a follow up and he indicated that he was waiting to receive direction from his lawyer as to the next steps. At that time he provided me with a copy of his handwritten letter to the Parole Board. Attached hereto and marked as exhibit "EP-1" is a copy of the letter.*

10. *In mid-December 2018, I spoke with the Applicant upon receiving instructions that he should complete his Parole package. I asked him if he wished to receive the package at that time or if he wanted to wait until the New Year when I returned from leave. He advised that he would wait until January 2019.*

11. *On the 8th January 2019 I met with the Applicant and provided him with the Parole application which included the housing and employment forms.*

12. *Thereafter I followed up with the Applicant on the 6th February 2019, 8th March 2019, 18th April 2019, and the 16th May 2019. However, he continued to advise that he intends to complete the package but was waiting to complete the documentation in its entirety before forwarding it, however the package was not received.*

13. *On 3rd October 2019, I met with the Applicant and he advised that he was successful with his application in relation to his criminal case. He felt that he should be released immediately without having to complete the package. However, I explained that he still needed to complete the Parole application process.*

14. *Since so much time had passed since I had provided the Applicant with a Parole package, I provided him with a new package to ensure that he had all of the information and told him that the sooner he completes the forms, the sooner he should be able to get before the Board. As of the date of signing this affidavit, the completed package has still not been received.*

15. *I would say that every effort was made to assist the Applicant with respect to his request for parole, but he continued to put off the completion of the Parole package*."

The 13 September 2019 Judgment delivered by Duncan AJ

28. Mr. Pettingill's complaint as to the unlawfulness of the recall was not properly before Duncan AJ in Case No. 61 of 2019. Under that Originating Summons, the only relief prayed was for the dismissal of the Magistrates' Court proceedings on Information 17CR00039 and a declaration as to the unconstitutional status of those Magistrates' Court proceedings. There is no pleading or reference made in the Originating Summons to a wrongful recall of the release licence by the Parole Board.

29. Given that context, at paragraphs 45 – 57 of Duncan AJ's judgment it is stated:

45. I now consider whether the revocation of the First Plaintiff's licence can be considered as relevant and part of the administrative process responsible for the delay.

46. Mr. Pettingill makes the following attack on the recall procedure. First, the Parole Board did not respond to his letter of the 15th November 2017 seeking the release of his client until the 22nd July 2019. Second, Mr. Pettingill disputes the assertion that his client has had a hearing before the Parole Board at all, and if such a hearing took place, it did not comply with the provisions of section 70R of the Criminal Code Amendment (No.2) Act as read with the recall procedure to be followed in the authorities, Smith and Trott.

47. Mr. Pettingill contends that the inevitable inference to be drawn from Mr. Robinson's arrest is that he was recalled because he was alleged to have committed a criminal offence. However, the letter from the Parole Board states:

> *"Nevertheless, Mr. Robinson breached condition eight (8) of the General Condition section of his Parole License, which reads as follows:*
>
> *(viii) To refrain from activities and association with persons, places or thinks that may lead to illegal activities…*
>
> *Through his actions and/or associations, Mr. Robinson has placed himself in violation of condition 8 as he was arrested with a person who has admitted to and who has been charged with being in possession of a controlled drug, namely cannabis"*

48. The point Mr. Pettingill makes is that the Parole Board could not have complied with the duty to give the First Plaintiff a fair hearing because the reason given for recalling him on the 16th November 2016, namely associating with a person charged with a criminal offence, is not something over which he could reasonably be said to have personal control. More importantly, the letter from the Parole Board dated 22nd July 2019, expresses another reason for the recall was the First Plaintiff's co-accused, the Second Plaintiff, admitted the offence. Mr. Pettingill refers to the chronology of events and asserts the Second Plaintiff pleaded not guilty at her first appearance before the Magistrates' Court on the 2nd February 2017. The Parole Board did not become aware the Second Plaintiff acknowledged responsibility for the offence until that fact was brought to its attention in the Chancery Legal letter dated 15th November 2017. Therefore, when did the recall hearing take place and what information was the First Plaintiff provided with to ensure the process complied with the guidance in the cases Smith and Trott?

49. Finally, Mr. Pettingill asserts associating with someone who admits to a criminal offence is not something over which Mr. Robinson had personal control and should not have formed the basis for recalling him. On this point, he relies upon the judgment of Chief Justice Ground in the Trott case.

50. Miss Tucker contends the First Plaintiff's recall on licence is a separate and unrelated issue which has no bearing on the question of delay. She further submits it is unfortunate the First Plaintiff could not be released on the bail he was granted; however, again that is a separate and distinct matter with no relevance to the application to stay the prosecution.

51. Miss Tucker and Mr. Pettingill did not agree on whether and when a hearing took place before the Parole Board, and if a hearing did take place, what procedure was adopted. Miss Tucker submitted if the Court was left in doubt regarding what happened at the recall hearing a further adjournment should be granted to enable the Parole Board to supplement the letter of the 22nd July 2019 with an affidavit. Bearing in mind the case concerns delay before the courts, and I had already granted one adjournment to secure a letter or affidavit from the Parole Board together with counsel responses to specific questions of law, I did not believe it would be a proper exercise of my discretion to grant a further adjournment.

52. In the case of Smith, Chief Justice Ground expressly referred to the problem a person on parole may face if having been arrested for a fresh offence and recalled by the Parole Board, the trial is delayed. In the case of Dyer, the Court expressly found that a relevant consideration of the question of delay is whether the complainant is in custody. In Dyer, the Privy Council also stated that consideration of the question of delay is an exercise of judicial discretion based upon all the circumstances in the case.

53. In my view, the time the First Plaintiff has spent in custody, which essentially comprises the time his parole has been revoked, is directly attributable to the charge he faces and should be considered part of the response of the administrative authorities on the question of delay.

54. Turning to the question of what view I should form regarding whether the Parole Board followed the procedure in Smith and Trott and its impact on the question of delay. First, and by way of clarification, I do not suggest that the recall procedure adopted by the Parole Board to recall the First Plaintiff caused a delay in the criminal trial. Second, it is unfortunate the Court was not furnished with the minutes of the recall hearing so that it could form its own view of the proceedings. See the case of Trott on page 3. Third, I remind myself I am not sitting to hear an application to quash the First Plaintiff's recall.

55. I therefore limit myself to consider whether the First Plaintiff's incarceration consequent upon his recall is part of the administrative process of the court, I should consider on the question of delay. Of course, if the Court was in possession of evidence that the First Plaintiff's recall hearing strictly complied with the procedure set out in the cases of Smith and Trott, the First Plaintiff could not rely upon his time spent in custody to his advantage to the same degree.

56. The letter from the Parole Board states the recall hearing complied with the procedure identified in the cases of Smith and Trott. However, the letter does not state when the hearing took place. The timing of the recall hearing is critical in light of the criticisms made by Mr. Pettingill.

57. Despite explaining what the Parole Board told the First Plaintiff he had to accomplish to be released from custody, the letter makes no mention or reference of the material the Parole Board relied upon to arrive at its decision at the hearing the First Plaintiff attended. Nor, does the letter mention that at the hearing the First Plaintiff had sight of the information within the possession of the Board which he was entitled to see such as the prosecution statements or a summary of the case against him. I am therefore unable to form a view of whether the recall hearing did comply with the law, in which case, I will give the First Plaintiff the benefit of the doubt when I consider the role his time in custody played on the question of delay.

The Relevant Law

Relevant Provisions of the Prisons Act 1979

30. Section 12 of the Prisons Act 1979 empowers the Parole Board to direct the release of any prisoner on licence once due consideration is given to any recommendation made by the Commissioner of Prisons. Section 12 is subject to section 70P of the Criminal Code (Eligibility for parole generally). Ms Dill-Francois referred the Court to the recall provisions under sections 12(5) and 12(5A) as to the governing procedure.

31. However, the Parole Board's powers to release a prisoner on licence under section 12 only applies to prisoners sentenced to fixed terms of imprisonment as opposed those serving a life sentence. The relevant section for my consideration is section 13 which applies to a prisoner serving a life sentence as opposed to a fixed term sentence. Section 13 is subject to section 70O which provides that the statutory minimum period for service of a life sentence is 15 years (where no other minimum period has been ordered).

32. Section 13 provides:

Release on licence; life imprisonment
13 (1) The Parole Board, after giving due consideration to any recommendations which may be made by the Commissioner of Prisons, and in compliance with any order of the court, or section 70O of the Criminal Code, may release on licence a prisoner serving a term of imprisonment for life (other than a term of imprisonment for life imposed by a court martial) or a prisoner who, having been sentenced to be detained during Her Majesty's pleasure, is by direction of the Governor being detained in a prison, subject to such conditions as may be specified in the licence; and the Parole Board may at any time vary or cancel any such conditions.

(2) The Parole Board may at any time by order recall to prison a person released on licence under this section, but without prejudice to the power of the Parole Board to release him on licence again; and where any person is so recalled his licence shall cease to have effect and he shall, if at large, be deemed to be unlawfully at large.

33. The recall powers under subsection (2) of section 13, unlike the recall provision under section 12 (5A), are broadly stated and absent of any express entitlement for the prisoner to appear and be heard in person. By way of contrast, section 12(5A) provides:

> *(5A) Where the Parole Board has recalled a prisoner to a prison for failure to comply with any requirements specified in the licence, the prisoner shall be entitled to appear and be heard in person before the Parole Board, before a final decision is made on whether he will be recalled to prison.*

34. While neither party referred to the Prison Rules 1980, I have found Rule 166 (1)(a) to be a very relevant part of my consideration:

> ***Assessment of conduct of prisoners; suitability for release***
> *166 (1) The Parole Board shall review at such intervals as are hereinafter specified the sentences of prisoners—*
>
> *(a) in the case of prisoners serving a term of imprisonment for life or ordered to he (sic)(be) detained during Her Majesty's pleasure, the review shall be rendered in the first instance when such prisoner first becomes eligible for release on licence under the Criminal Code and thereafter at intervals of 12months;*
>
> *(b) in the case of prisoners serving a fixed term of imprisonment and in the case of prisoners who are under the age of eighteen years at the date of sentence, the review shall be rendered, in the first instance, at the expiration of one-third of the adjudged term of imprisonment or a period of twelve months from the date of sentence, whichever is the greater, and thereafter at such intervals as may be deemed appropriate by the Board.*
>
> *(2) The Parole Board may, in the case of any such prisoner who is, in the opinion of the Parole Board, suitable for release from prison on licence or under supervision, grant such release from prison.*
>
> *[Rule 166 para (1) amended, para (2) substituted, by 2001:2 s.13 & Sch 2 effective 1 October 2001; para(1)(b) amended by 2001:20 s.7(1) & Sch 2 effective 1 November 2001; para (1)(a) and (b) amended by 2001:29 s.11(1) & Sch effective 29 October 2001]*

35. Rule 166 (1)(a) is not conditional or dependent on the completion of a parole application form. It requires the Board, whether or not aided by documents submitted by the life sentence

prisoner, to review his suitability for release every 12 months once he has become eligible for release.

Constitutional Provisions raised on the Plaintiff's pleaded case

36. The Plaintiff asserted that his constitutional right to protection from arbitrary arrest or detention was breached by the Parole Board's decisions to revoke his licence and to continue to detain him through to present day.

37. I am grateful to Counsel for the Defendants for having resourcefully included the judgment of *Martin Cashman v The Parole Board and The Minister of Labour, Home Affairs and Public Safety [2010] Bda L.R. 45* where I was led to the useful remarks of Kawaley J (as he then was) at pages 12-13:

"*40. The problem is that applications for relief for breach of fundamental rights protected by Part I of the Constitution must be made under section 15 of the Constitution. The proviso to section 15(2) states that "the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law." Just as an applicant for relief under the European Convention on Human Rights ("ECHR") must first exhaust their remedies under domestic law, a section 15 applicant must demonstrate that the ordinary law affords him no adequate means of redress. This rule ought to have far greater rigidity in its application to an applicant under the ECHR who is seeking relief from an international tribunal than it has within the national sphere. A far more flexible approach ought to be adopted by this Court to judicial review applications which raise constitutional issues, as it is the same tribunal which competent to adjudicate both the non-constitutional and constitutional applications.*

41. Such an approach was adopted in Fay v Governor [2006] Bda LR 66 and Fay v Governor [2006] Bda LR 65 where I heard an application for judicial review and constitutional relief together. In that case the constitutional point was raised as a substantive point from the outset and it was reasonably clear that it would have to be determined. In the present case the constitutional points were raised as an aide to interpretation only; it was not clear prior to the hearing that these points would have to be determined. Because an application under section 15 must be by originating summons and requires no leave, while a judicial review application under Order 53 requires leave and entails different originating process, the two species of application cannot be combined in the same originating application document. Nevertheless where an applicant for judicial review wishes to raise a constitutional point as an aide to statutory interpretation and, if the judicial review application fails, to seek substantial constitutional relief, the following approach ought perhaps to be adopted.

42. An application under section 15 ought to be filed at the same time as the Order 53 application, so that the two applications can (if appropriate) be heard together. This will likely be appropriate in all cases where: (a) the judicial review application is opposed; and/or (b) the judicial review application is not demonstrably a very strong case; and (c) the urgency of the judicial review application being heard on its merits is not incompatible with a fair hearing of an application under section 15 of the Constitution. The merits of the judicial review application will usually be relevant to this case management exercise because dealing with constitutional matters at the same time as a judicial review application will involve additional costs which ought to be avoided if it seems improbable at the interlocutory stage that the need for relief under section 15 will actually arise…"

38. In this case before me, the Plaintiff pleaded in his application for leave to apply for Judicial Review (the Form 86A which currently stands akin to a Notice of Originating Motion by agreement between the parties and the Court's approval) a breach of his rights against arbitrary detention as protected under section 5 (Schedule 2) of the Bermuda Constitution which provides:

Protection from arbitrary arrest or detention
5 (1) No person shall be deprived of his personal liberty save as may be authorized by law in any of the following cases:

(i) in execution of the sentence or order of a court, whether established for Bermuda or some other country, in respect of a criminal offence of which he has been convicted or in consequence of his unfitness to plead to a criminal charge;

(ii) in execution of the order of a court punishing him for contempt of that court or of another court or tribunal;

(iii) in execution of the order of a court made in order to secure the fulfilment of any obligation imposed upon him by law;

(iv) for the purpose of bringing him before a court in execution of the order of a court;

(v) upon reasonable suspicion that he has committed, is committing, or is about to commit, a criminal offence;

(vi) in the case of a person who has not attained the age of twenty-one years, under the order of a court or with the consent of his parent or guardian, for the purpose of his education or welfare;

(vii) for the purpose of preventing the spread of an infectious or contagious disease or in the case of a person who is, or is reasonably suspected to be, of unsound mind, addicted to drugs or alcohol, or a vagrant, for the purpose of his care or treatment or the protection of the community;

(viii) for the purpose of preventing the unlawful entry of that person into Bermuda or for the purpose of effecting the expulsion, extradition or other lawful removal from Bermuda of that person or the taking of proceedings relating thereto.

(2) Any person who is arrested or detained shall be informed as soon as is reasonably practicable, in a language that he understands, of the reasons for his arrest or detention.

(3) Any person who is arrested or detained in such a case as is mentioned in subsection (1)(d) or (e) of this section and who is not released shall be brought without undue delay before a court; and if any person arrested or detained in such a case as is mentioned in the said paragraph (e) is not tried within a reasonable time he shall (without prejudice to any further proceedings that may be brought against him) be released either unconditionally or upon reasonable conditions, including in particular such conditions as are reasonably necessary to ensure that he appears at a later date for trial or for proceedings preliminary to trial.

(4) Any person who is unlawfully arrested or detained by any other person shall be entitled to compensation therefor from that other person.

(5) Any person who is arrested shall be entitled to be informed, as soon as he is brought to a police station or other place of custody, of his rights as defined by a law enacted by the Legislature to remain silent, to seek legal advice, and to have one person informed by telephone of his arrest and of his whereabouts.

39. Section 5(1) of the Constitution expressly calls for existing laws to be read and construed in pursuance of the Constitution. It states:

Existing laws

5 (1) Subject to the provisions of this section, the existing laws shall have effect on and after the appointed day [2 June 1968] as if they had been made in pursuance of the Constitution and shall be read and construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

40. Section 15(1)-(2) of the Constitution outlines the redress powers of the Supreme Court where it has been determined that a constitutional right has been contravened.

Enforcement of fundamental rights

15 (1) If any person alleges that any of the foregoing provisions of this Chapter has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter which is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction—

(a) to hear and determine any application made by any person in pursuance of subsection (1) of this section; and
(b) to determine any question arising in the case of any person which is referred to it in pursuance of subsection (3) of this section,

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the foregoing provisions of this Chapter to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress are or have been available to the person concerned under any other law.

Common Law Principles of Natural Justice against Procedural Impropriety

41. The duty of the Parole Board to comply with the common law rules of natural justice is compendiously illustrated by reference to Lord Bingham's 2011 Oxford University Press publication as cited by Kawaley J in *Cashman v The Parole Board:*

"*Ministers and public officers at all levels must exercise the powers conferred on them in good faith, fairly, for the purpose for which the powers were conferred and not unreasonably. This rule recognizes, as did Magna Carter, that public power is held on trust, not as a privilege conferred on its possessor. So while we would readily accept that in a complex society such as ours power must necessarily be conferred on many ministers, officials, administrators and judges, we do not give any of them, ever, a blank cheque to draw on as they choose. The power is given for a purpose, which must be honoured*."

42. Mrs. Dill-Francois pointed to a selection of previous judicial decisions of concurrent jurisdiction, involving fixed term sentences decided under section 12.

43. In *Shane Smith v The Minister of Health and Social Services and The Commissioner of Prisons [1996] Civil Jurisdiction No. 19 of 1996* Ground J (as he then was) quashed the recall of the applicant who had been serving a 14 year sentence. Mr. Smith had been released on licence under section 12 but was subsequently recalled by a revocation order which did not specify the nature of the breach nor the allegations against the applicant. The background to the revocation was that the applicant had been arrested for possession of heroin while he was enjoying the liberty of his release on licence. In addition to the complaint of non-disclosure of the allegations of breach, the applicant further complained that he was not afforded the opportunity to be heard before having been taken back into custody.

44. In considering the relevant provisions of the Prisons Act 1979, Ground J referred to section 12(1) in its previous form, which is similar to the current drafting of section 12(1) save that the power to direct a release on licence is now vested in the Parole Board, in consideration of any recommendation made by the Commissioner of Prisons.

45. When the case of *Shane Smith* was decided, section 12(5) empowered the Minister to recall a prisoner but section 12(5A) was not in force as it subsequently came into operation on 1 October 2001. This is affirmed by Ground J's remark on page 3 of the judgment that "… *no procedure is prescribed, either in the Act itself or in the Prison Rules 1980, and in particular there is no statutory requirement for a hearing*." Since the operation of section 12(5A) that is no longer the case since section 12(5A) expressly confers to the right to appear and to be heard in person.

46. However, the judicial reasoning underlying the decision in *Shane Smith* is of particular relevance in this case because section 13 is void of a prescribed procedure in the same defunct way that section 12 previously was. Ground J, in considering the applicable principles of natural justice, made the following observations at pages 4-6 of his decision:

"*That is not the end of the matter, however, because it leaves the critical question of what the duty to act fairly entails in those circumstances. It is now well established that what amounts to fairness, or what the rules of Natural Justice require, is not an absolute, but varies according to the nature of the decision being made*:

> *"The scope and extent of the principles of Natural Justice depend on the subject matter to which they are sought to be applied." Per Brightman LJ in Payne v Lord Harris of Greenwich [1981] 1 WLR 754, citing R v Gaming Board for Great Britain, ex parte Benaim and Khaide [1970] 2 QB 417, 430.(")*

In some cases fairness may require a full evidential hearing, while in others it is enough that the decision maker brings a fair and open mind to the decision.

In the English case of Regina v Secretary of State for the Home Department, ex parte Gunnell, The Times, November 3rd 1983, DC, it was held that orally informing the person to be recalled on the grounds of his recall, and giving him an opportunity to make written representations, was sufficient. The reliance I can place upon that case is limited because in England the conduct of the relevant Board in its decision making process is prescribed by statute, which requires that the applicant be informed of the allegations against him and be offered an opportunity to make written representations, but makes no provision for an oral hearing: see section 62(3) of the Criminal Justice Act 1967. However, despite the headline to the report, the case does not decide that Natural Justice does not apply to revocation cases, but rather that it does, although its requirements are not extensive and do not go beyond the

prescribed procedure. Moreover, even though the decision as a whole may be distinguished on the basis of the existence in England of a prescribed procedure, I think that I can nevertheless have regard to Lord Justice Watkins's (sic) dictum, which is of general application, that parole is a privilege and not a right.

On the question of what fairness requires where there are no statutory rules, I have been particularly assisted by the Australian case of Johns v Release on Licence Board & Ors (1987) 9 NSWLR 103, a decision for the Court of Appeal for New South Wales, which was very properly and helpfully put before me by counsel for the respondents. There it was held that the Board was under a duty to act fairly in considering the recall of a prisoner released on licence, and that that involved hearing him. The Court expressly rejected the argument that, because the governing legislation did not provide for a hearing, the need to have one was excluded by implication. In considering what the duty to act fairly involved the Court said-

> *"Words of such generality, "the duty to act fairly," have the advantage of flexibility and the capacity to adapt with changing community attitudes and expectations and the differing circumstances of particular cases. But they present a very practical problem to statutory bodies such as the Board and to administrators generally. Provided with no specific guidance by Parliament as to what they should do in particular cases, the somewhat vague injunction of the common law to proceed with fairness as the case requires may lead to uncertainty and error, even where there is a will to act fairly. In part, this is inescapable. Different courts at different times may consider that different requirements should be observed. But courts within the one jurisdiction do well to endeavor to reduce the confusion by adopting, as far as differing legislation permits, consistent approaches to the elaboration of the requirements of procedural fairness. They also do well to spell out those requirements with due regard to the practicalities, including the costs involved, having regard to the benefits which stand to be gained."*

At the end of that day in that case the Court ordered that the Board should-

(a) notify the plaintiff of its intention to consider the question of the possible revocation of his licence;

(b) notify the plaintiff of any material to be considered by it in relation to this matter, save for any material which may be lawfully withheld;

(c) permit the plaintiff to make relevant written submissions in relation to the matter relevant to the consideration by the Board of the said possible revocation of the plaintiff's licence; and

(d) afford the plaintiff an opportunity to be heard orally in relation to such matters

I concur with, and have followed that decision, the reasons for which I find most lucid and helpful. Based upon it I consider, in the case of the recall of a prisoner under section 12(5) of the Prisons Act, is that what is necessary is that he be informed of the allegations against him and given an opportunity to make representations upon them. He should also be given an opportunity to make representations upon them. He should also be given an opportunity to make representations upon the subject of his recall generally; in other words to advance mitigating factors. In the case before me, factors such as the sickness of the applicant's mother, and the recent birth of a child, would fall into this category. It is for the decision maker – the Minister – what weight he eventually attaches to such matters, and I make no comment on that. I simply say that he should be aware of them so that he can consider them before arriving at his decision.

In my view the prisoner should be afforded an opportunity to make his representations both in writing and orally, if desired, and (given that his liberty is at stake) that extends to permitting him representation by counsel or a McKenzie type friend. I also think that the prisoner should be allowed, within reason and in an appropriate case, to call any witnesses on his own behalf to support his case.

However, I do not think that fairness requires that the complaint or allegations against the prisoner be proved in any formal sense, nor do I think that an evidential hearing is required to establish them. This is because parole is a privilege and not a right, and until the completion of his original sentence a prisoner cannot claim the right to liberty of person guaranteed to others under the Constitution. Moreover, in order to retain an effective control over a prisoner the authorities need to be able to effect a speedy recall in cases of breach, without being unduly impeded, subject of course to the requirement that they do so in a fair manner. For the same reason I do not think that the decision maker is precluded from having regard to hearsay or other matters which would be excluded by the strict rules of evidence, provided he puts his mind to the dangers inherent in such a course. The best way that he ensures that he puts his mind to such dangers is for him to hear the prisoner's representations.

47. On page 7 of the judgment in *Shayne Smith*:

When the reason for the recall is pending criminal charges in respect of some offence alleged to have been committed while on licence, I do not think that the Minister need wait until a Court has disposed of those charges. To do so might well defeat the whole process if the trial is delayed, as it often may be. Release on licence is only a privilege and not a right, and the sanction of recall, to be effective, has to be a summary one. I think therefore that the Minister can decide to recall on the basis of pending criminal charges before they are determined by a Court, although whether he does so remains a matter for the exercise of an informed discretion taking account of all the circumstances. However, before recommending such a

course I think that the Board should have before it sufficient details of the case for its members to understand the circumstances of the offence generally and to see whether there is a prima facie case, and the prisoner should be afforded sight of that material so that he can properly address the Board on that point. That may most conveniently be done by providing sight of the prosecution statements, where they are available, but where they are not, a sufficient summary should be put before the Board to enable it to discharge this function properly…"

Decision and Analysis

The Limitation Argument in respect of Ground 1:

The Respondents' Decision to unlawfully recall the Applicant between 15th November 2016 and present day;

48. Mrs. Dill-Francois submitted that the Plaintiff is time-barred from advancing this ground as the decision of 15th November 2016 is the true subject of the complaint.

49. RSC O.53/4 requires that an application for leave to apply for judicial review shall be made promptly and in any event within six months from the date when grounds for the application first arose unless the Court considers that there is a good reason for extending the period within which the application shall be made.

50. I accept Mr. Pettingill's submission that the disposal of the Magistrates' Court proceedings in 13 September 2019 was the first point at which Plaintiff had an arguable case that the recall and continued detention was unlawful.

51. Ground 1, which is nearly indistinguishable from Ground 2, is pleaded as a continuing cause of action through to present day. Even if Ground 1 does not truly defeat the limitation rule from a computation perspective or otherwise, I find that there is a good reason for extending the period for the making of the application. Given the level of judicial interest and probe from Duncan AJ on the lawfulness of the recall, it was reasonable for the Plaintiff to rely on the Court's remarks, albeit *obiter dicta*, as a basis for formally challenging the recall.

Consideration of the Grounds 1 and 2 Substantively:

52. While neither party drew my attention to section 13 (no doubt, owing to an erroneous belief that section 12 of the Prisons Act 1979 applies), Counsel provided me with previous case law which preceded the operation of section 12(5A). The clear benefit and relevance of the judicial reasoning in *Shayne Smith* in particular is that the stated principles of natural justice

currently apply to section 13 as they previously did to section 12 before section 12(5A) came into force on 1 October 2001.

53. While I have carefully considered and align my general views with the learned remarks of Kawaley J in *Cashman v The Parole Board* in respect of the need for procedural independence and cleanliness for constitutional applications, I also note that in this case, the circumstances are somewhat different. The constitutional complaints in this case were pleaded in the originating process document and the issues before me now are constitutional in nature as there is a heavy reliance on the common law principles of natural justice in asserting the Plaintiff's right not to be arbitrarily detained.

54. In my judgment, the question of an arbitrary detention arises from the moment that a prisoner is being detained in custody without due consideration to a release on licence under circumstances where there is a lawful entitlement to such a review. When I say due consideration I mean a proper hearing process.

55. Mrs. Dill-Francois readily accepted that the prisoner was entitled to appear and be heard in person before the Parole Board but did so under the misguided notion that section 12 applies in this case.

56. Seemingly, this presents me with the unenviable task of addressing my mind to the following issues which were not expressly pleaded or argued before me:

    (i) Whether section 13(2) of the Prisons Act 1979 infringes on constitutional provisions which protect against arbitrary arrest;

    (ii) Whether section 13(2) of the Prisons Act 1979 infringes on constitutional principles of natural justice; and

    (iii) Whether section 13(2) shall be read to confer on a prisoner the same entitlement to appear in person and to be heard before the Parole Board as applies to section 12(5A).

57. While section 13 may have been overlooked by Counsel (perhaps understandably, given the short timeframe in which this matter was heard after the original filings), I am satisfied that the above points are glaringly consequential to the below questions which were raised on Mr. Pettingill's case and to which I may focus my attention:

    (i) Whether, as a matter of constitutional law involving principles of natural justice, a prisoner serving a life sentence is entitled to be informed on the causes of an initial

revocation of licence and to appear and be heard in person as part of the hearing process before a final determination is made; and

(ii) Whether, under the same constitutional principles, that same prisoner is entitled to be fully informed, within a reasonable timeframe, of the reasons for the decision made.

58. While it has no universal application, the rules of natural justice, in my judgment, implicitly require that the Plaintiff be given the same entitlement to appear and to be heard in person, as given to a prisoner under section 12(5A). I agree with the general approach outlined by Ground J in the case of *Shayne Smith* and find that whether it be in respect of section 12 or 13 of the Prisons Act 1979, the following procedural steps are required by the common law principles of natural justice in avoidance of an infringement of the section 5 constitutional protection against arbitrary detention:

1. The prisoner is to be informed in writing of the allegations against him which give cause for a hearing on whether his license will be recalled. The allegations should be accompanied by a summary of the relevant information supportive of the allegations;

2. The prisoner is to be informed as soon as is practicable of the date on which the hearing will be held and should be given sufficient opportunity to avail himself of the measures set out in this list;

3. The prisoner is to be given an opportunity to submit written representations and relevant documentation to the Parole Board in advance of the hearing. Such representations and documentation may be on the subject of the recall or on any personal mitigating factors for the Board's consideration;

4. The prisoner is to be given an opportunity to call witnesses in his support on matters relevant to the recall or to personal mitigation (Notwithstanding, a full evidentiary presentation by the Parole Board of the allegations against the prisoner is not required and the strict evidentiary rules that apply to a Court hearing need not apply to a hearing before the Board.)

5. As soon as is practicable after the making of any final decision, a minute shall be made of the decision of the Board in compliance with item 7 of the First Schedule of the Parole Board Act 2001 and the prisoner must be provided with a copy of the minute of that decision without delay. (The minute of the decision should include a summary note of the hearing held and a statement of the reasons upon which the decision is based.)

59. In respect of items 3 and 4 above, the prisoner is entitled to act through the representation of an attorney or McKenzie type friend.

60. Mrs. Dill-Francois argued that the 21 November 2016 meeting constituted a hearing. While I accept on the facts that the Plaintiff appeared before the Parole Board on 21 November 2016 on the subject of his recall, I find that the Parole Board fell short of offering a fair hearing as outlined by the fair hearing procedural steps set out above.

61. Further, I find that since 21 November 2017 (a year after the 21 November 2016 meeting) the Parole Board is in breach of Rule 166(1)(a) which requires a review hearing of the Plaintiff's eligibility for release at 12 month intervals (from the point at which the prisoner initially becomes eligible for parole by operation of statute and/or court order). This is the case whether or not the administrative application form process has been completed by the Plaintiff. Of course, a failure to supply adequate information to the Board may in some cases obstruct the Board's clear view of the merits of an application for release on licence.

62. In practical terms, I think it only fair to add that the Plaintiff, to some extent, was also the author of his own delay. It seems to me that he would have likely been produced and heard before the Board long before now had he or his Counsel simply replied earlier and furnished the Board with the documents requested under their letter of 22 December 2017. In the end, nothing turns on this because the Plaintiff's molasses pace did not disentitle him to review hearings at 12-month intervals under Rule 166(1)(a).

63. As a final point, I turn to Mr. Pettingill's complaint made on his oral submissions that a recall of a licence cannot fairly be founded on an allegation that the prisoner found himself in association with another who engaged in illegal activity. Mr. Pettingill argued that the Plaintiff cannot be held accountable for the actions of others.

64. I cannot agree to this submission in absolute terms. There will be cases where it is open to the Parole Board to reasonably find that a prisoner on release knew or ought to have reasonably foreseen that he was placing himself in an environment of illegal activity. Conversely, there may be other cases where the Board ought to find that the prisoner could not have reasonably been expected to know that he was in danger of being present amongst such illegal activity. Each case ought to be decided on its own peculiar facts.

Conclusion

65. I have ruled against the Defendant in respect of the time limitation point.

66. I have found the Parole Board was in breach of the common law principles of natural justice in respect of the hearing process which occurred on 21 November 2016.

67. I have also found that the Parole Board was in breach of Rule 166(1)(a) of the Prison Rules 1980 in failing to convene a review hearing at 12-month intervals from 21 November 2016.

68. The Parole Board is directed to convene a hearing within 14 days of the date of this judgment for the purpose of reviewing the Plaintiff's eligibility for release on licence. The date of the hearing shall be made known to the Plaintiff and/or his Counsel in writing within 3 days of the date of this judgment.

69. Unless either party files a Form 31D to be heard on the issue of costs within 14 days of the date of this judgment, I make no order as to costs on the understanding that the Plaintiff is legally aided and that a cost order would only serve to transfer funds from one pocket of the government purse to another.

Tuesday 19 November 2019

HON. MRS. JUSTICE SHADE SUBAIR WILLIAMS
PUISNE JUDGE OF THE SUPREME COURT